Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 23NCVC-108–09 OF 2012
ROSNAINI SAUB J
23 MAY 2016

Tort — Defamation — Libel — Whether impugned statements in articles and videos defamatory in nature against plaintiff — Whether plaintiff succeeded in establishing three basic elements of defamation — Defences — Qualified privilege — Whether defendants could rely on qualified privilege — Whether subject matter of impugned statements matter of public interest — Whether defence of reportage clearly available to defendants — Whether defendants succeeded in raising defence of qualified privilege — Malicious falsehood — Proof of malice — Whether impugned statements false and published by defendants maliciously false

The plaintiff is a gold mining company situated in Bukit Koman, Pahang, since 2009. The plaintiff claimed that the first defendant, which operated an online news portal, had published three articles and two videos ('the articles and videos') which were defamatory in nature of the plaintiff. The first of the three articles ('the first article') was authored by the second defendant, the assistant news editor of the first defendant, while the remaining two articles ie the second and third articles were authored by the third defendant, a senior journalist with the first defendant, and the fourth defendant, an intern at the first defendant, respectively. The first of the two videos ('the first video') was linked with the second article, while the second video was linked to the third article. The plaintiff argued that the articles and videos were all related to the use of sodium cyanide in the plaintiff's gold mining plant which had caused 'cyanide pollution' in the Bukit Koman area and had led to many residents in the surrounding area suffering health problems. The plaintiff filed a claim against the defendants for defamation and malicious falsehood. It was the plaintiff's case that the impugned statements in the articles and videos, which were false and published by the defendants maliciously, were intended to disparage the plaintiff in the way of its trade and business. In their defence, the defendants denied that the impugned statements were defamatory and principally relied on the defence of qualified privilege and fair comment. As for the defence of qualified privilege the defendants asserted they had exercised responsible journalism and reportage and maintained that the articles and videos published were about matters of public interest of a national scale.

Held, dismissing the claim with costs of RM50,000:

(1) There was little dispute that the plaintiff had established two of the three elements of defamation, that is, the words complained of in the articles and videos referred to the plaintiff and there was publication of the same in the first defendant's news portal, which being online would have been read by its subscribers. As for the issue as to whether the impugned statements were defamatory of the plaintiff, it was clear that the words complained of in the articles and corresponding videos had the tendency to bring disrepute to the plaintiff in the eyes of any reader of the articles and videos. In effect the articles and videos made the plaintiff out to be lacking in integrity and unethical and portrayed it to be a greedy mining company. The plaintiff had therefore succeeded in proving, on the balance of probabilities, all the three basic elements of defamation (see paras 13–16).

(2) The defendants could rely on qualified privilege or the defence known as the *Reynolds* privilege, which is a defence of responsible journalism most likely to be raised by a newspaper and journalists, such as the defendants herein. The *Reynolds* privilege could be raised as a defence in two situations, namely where the subject matter of the impugned statement is a matter of public interest, in which case the journalist should exercise responsible journalism; and in reportage, a rare form of the *Reynolds* privilege, where the public interest lies in the making of the allegation itself and not the contents of the allegation. In the present case, the evidence adduced showed that prior to the publication of the articles and the videos there was already extensive coverage by the other media on the issue of gold mining activities using cyanide. There were also protests and legal proceedings raised by the residents of Bukit Koman pertaining to the plaintiff's gold mining activity. As such, the issue pertaining to the concern of the Bukit Koman's residents about the operation of the gold mine in their town was clearly a matter of public interest (see paras 19 & 21–22).

(3) Although the plaintiff submitted that the first and second defendants had not verified the contents of the first article with the plaintiff or other experts before publishing the same, the act of the second defendant contacting the Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article was sufficient in the circumstances of this case to constitute responsible journalism. As for the second and third articles and the videos linked with those articles, it was clear that these were a matter of public concern where the public in general had the right to know the information and the defendants as media and journalists were under a moral duty to publish the same. Further, the defence of reportage was clearly available to the defendants with regard to the publication of the second and third articles and the two videos because the public interest here lies not in the truth of the contents of the articles and videos, but on the fact that they had been made. As the

plaintiff had not specifically pleaded reportage in its defence, it should not be allowed to rely on this particular defence (see paras 24–27).

(4) It was trite that one of the vital ingredients in the tort of malicious falsehood was that the impugned statements, apart from being false, were published maliciously. Since the plaintiff had not proven malice, it followed that the plaintiff's claim for malicious falsehood should also fail (see paras 28 & 30).

[Bahasa Malaysia summary

Plaintif adalah syarikat perlombongan emas yang terletak di Bukit Koman, Pahang, sejak tahun 2009. Plaintif mendakwa bahawa defendan pertama, yang mana mengoperasikan portal berita dalam talian, telah menerbitkan tiga artikel dan dua video (artikel dan video) yang mana bersifat fitnah terhadap plaintif. Artikel pertama daripada tiga artikel (artikel pertama) yang dikarang oleh defendan kedua, penolong editor berita defendan pertama, manakala dua lagi artikel iaitu artikel kedua dan ketiga dikarang oleh defendan ketiga, seorang wartawan kanan defendan pertama, dan defendan keempat, pelatih defendan pertama, masing-masing. Video pertama daripada dua video (video pertama) berkaitan dengan artikel kedua, manakala video kedua berkaitan dengan artikel ketiga. Plaintif menghujahkan bahawa artikel dan video adalah berkaitan dengan penggunaan sodium cyanide dalam loji perlombongan emas yang mana menyebabkan 'cyanide pollution' di kawasan Bukit Koman dan telah mengakibatkan kepada ramai penduduk di sekitar kawasan itu mengalami masalah kesihatan. Plaintif memfailkan satu tuntutan terhadap defendan untuk fitnah dan kepalsuan niat jahat. Ia adalah kes plaintif bahawa kenyataan yang dipersoalkan di dalam artikel dan video, yang mana adalah palsu dan diterbitkan oleh defendan dengan niat jahat, adalah bertujuan untuk merendahkan plaintif dalam perdagangan dan perniagaan. Dalam pembelaan mereka, defendan menafikan bahawa kenyataan yang dipersoalkan adalah merupakan fitnah dan sebahagian besarnya bergantung kepada pembelaan perlindungan bersyarat dan komen yang adil. Untuk pembelaan perlindungan bersyarat defendan menegaskan mereka telah melakukan kewartawanan dan pelaporan yang bertanggungjawab dan mengekalkan bahawa artikel dan video adalah perkara tentang kepentingan awam di skala nasional.

Diputuskan, menolak tuntutan dengan kos sebanyak RM50,000:

(1) Terdapat pertikaian yang kecil bahawa plaintif telah membuktikan dua daripada tiga elemen fitnah, iaitu, perkataan yang diadukan di dalam artikel dan video merujuk kepada plaintif dan terdapat penerbitan yang sama di dalam portal berita defendan pertama, yang mana disebabkan ia dalam talian akan dibaca oleh pelanggannya. Untuk isu sama ada kenyataan yang dipersoalkan adalah berupa fitnah terhadap plaintif, adalah jelas bahawa perkataan yang diadukan dalam artikel dan video berkaitan mempunyai kecenderungan untuk mencemarkan nama

plaintif pada mata mana-mana pembaca artikel dan video. Sebetulnya artikel dan video menjadikan plaintif kurang berintegriti dan tidak beretika dan menunjukkan ia adalah syarikat perlombongan emas yang tamak. Plaintif oleh itu berjaya membuktikan, atas imbangan kebarangkalian, kesemua tiga elemen adalah asas fitnah (lihat perenggan 13–16).

(2) Defendan boleh bergantung kepada perlindungan bersyarat atau pembelaan yang dikenali sebagai perlindungan *Reynolds*, yang mana satu pembelaan kewartawanan bertanggungjawab yang selalunya akan dibangkitkan oleh suratkhabar dan wartawan, seperti defendan di sini. Perlindungan *Reynolds* boleh dibangkitkan sebagai pembelaan dalam dua keadaan, iaitu di mana perkara subjek kenyataan yang dipersoalkan itu adalah perkara berkaitan kepentingan awam, yang mana wartawan sepatutnya menjalankan kewartawanan bertanggungjawab; dan dalam pelaporan, satu bentuk perlindungan *Reynolds* yang jarang berlaku, yang mana kepentingan awam terletak di dalam membuat dakwaan itu sendiri dan bukan kandungan dakwaan. Dalam kes ini, keterangan yang dikemukakan menunjukkan bahawa sebelum penerbitan artikel dan video sudah terdapat liputan luas oleh media lain terhadap isu aktiviti perlombongan emas menggunakan cyanide. Terdapat juga protes dan prosiding undang-undang dibangkitkan oleh penduduk Bukit Koman berkaitan aktiviti perlombongan emas plaintif. Oleh itu, isu berkaitan dengan keprihatinan penduduk Bukit Koman tentang operasi lombong emas di bandar mereka adalah jelas merupakan perkara kepentingan awam (lihat perenggan 19 & 21–22).

(3) Walaupun plaintif mengemukakan bahawa defendan pertama dan kedua tidak mengesahkan kandungan artikel pertama dengan plaintif atau pakar lain sebelum menerbitkan yang sama, tindakan defendan kedua menghubungi Pengerusi Jawatankuasa Anti-Cyanide sebelum penerbitan artikel pertama adalah mencukupi dalam situasi kes ini untuk menunjukkan kewartawanan bertanggungjawab. Untuk artikel kedua dan ketiga dan video berkaitan dengan artikel tersebut, adalah jelas bahawa itu adalah perkara perhatian awam yang mana pihak awam secara amnya mempunyai hak untuk mengetahui maklumat dan defendan sebagai media dan wartawan di bawah tanggungjawab moral untuk menerbitkan yang sama. Seterusnya, pembelaan pelaporan adalah jelas tersedia kepada defendan berkaitan dengan penerbitan artikel kedua dan ketiga dan dua video kerana kepentingan awam di sini terletak bukan pada kebenaran kandungan artikel dan video, tetapi terhadap fakta bahawa ia telah dibuat. Oleh kerana plaintif tidak secara spesifik memplidkan pelaporan dalam pembelaannya, ia tidak boleh dibenarkan untuk bergantung terhadap pembelaan khas ini (lihat perenggan 24–27).

(4) Adalah biasa bahawa satu daripada unsur penting dalam tort niat jahat

kepalsuan adalah kenyataan yang dipersoalkan, selain daripada palsu, telah diterbitkan dengan niat jahat. Memandangkan plaintif tidak membuktikan niat jahat, itu diikuti bahawa tuntutan plaintif untuk niat jahat kepalsuan juga sepatutnya gagal (lihat perenggan 28 & 30).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (refd)
Flood v Times Newspapers Ltd [2012] 2 WLR 760, SC (refd)
Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2012] 4 MLJ 191, CA (distd)
Jameel v Wall Street Journal Europe SPRL [2006] 3 WLR 642, HL (refd)
Reynolds v Times Newspaper Ltd [2001] 2 AC 127; [1999] 4 All ER 609, HL (folld)
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)

Cecil Abraham (Sunil Abraham with him) (Cecil Abraham & Partners) for the plaintiff.
James Khong (Syahredzan Johan with him) (James Khong) for the defendants.

Rosnaini Saub J:

[1] The plaintiff is a company involved in, and is operating, a gold mine located in Bukit Koman, in the District of Raub, in Pahang since the year 2009. The first defendant is a company that owns andoperates an online news portal known as *Malaysiakini* which website is *www.malaysiakini.com*. The second defendant is the Assistant News Editor of *Malaysiakini*. The third defendant is the Senior Journalist of *Malaysiakini*. The fourth defendant was, at the material time, an intern at *Malaysiakini* and was pursuing a degree in Bachelor of Arts in Journalism.

[2] The plaintiff's suit against the defendants is for defamation and malicious falsehood relating to the publication of three articles and two videos in *Malaysiakini* news portal as follows:

(a) an article titled '*Villagers Fear For Their Health Over Cyanide Pollution*' published on 19 March 2012 ('the first article') which was authored by

the second defendant. The full text of the first article can be found at pp 1–2A of Bundle B2;

(b) an article titled *78pct Bukit Koman Folk Have 'Cyanide-Related' Ailments*' published on 21 June 2012 ('the second article') which was authored by the third defendant. The full text of the second article can be found at pp 3–5 of Bundle B2;

(c) a video presentation that was linked with the second article published on 21 June 2012 ('the first Video'). The VCD and transcript of the first video can be found at pp 6–10 of Bundle B2;

(d) an article titled *'Raub Folk To Rally Against 'Poisonous Gold'* published on 2 August 2012 ('the third article') authored by the fourth defendant. The full text of the third article can be found at p 11 of Bundle B2; and finally

(e) a video presentation that was linked with the third article published on 2 August 2012 ('the second video'). The VCD and transcript of the second video (including the English translation thereof) can be found at pp 12–14 of Bundle B2.

The articles and the videos shall also hereinafter referred to collectively as 'the said articles and videos'. As can be seen by reading and viewing the said articles and videos, they were all related to the plaintiff's gold mining operation in Bukit Koman, and the apparent unhappiness and protest by the residents there.

THE FIRST ARTICLE

[3] The plaintiff in para 8 of the statement of claim averred that the following words found in the first article are defamatory of the plaintiff:

> Besides suffering from the unbearable stench overnight, villagers have also found yellow powdery spots around their neighbourhoodin Bukit Koman, Raub, where gold-mining activities using cyanide, a hazardous chemical, started three years ago.
>
> According to the blog, since the commencement of the gold-mining activities, birds such as pigeons and crows, and lizards and vegetable cultivated in the neighbourhood have been found dead.
>
> Villagers suspect the unexplained deaths, the stench of herbicide during the night, and the illness, are the result of cyanide pollution.
>
> Committee chairperson Wong Kin Hoong told Malaysiakini that the yellow spots may be residue from emissions from the mining operations.

According to the plaintiff as per para 9 of the statement of claim, those words in the first article in their natural and/or ordinary meaning and/or alternatively by way of innuendo, bear the following defamatory meanings of and concerning the plaintiff:

(a) that there is the existence of *'yellow powdery spots around the*

neighbourhood of Bukit Koman, Raub' which is caused directly by the use of sodium cyanide in the plaintiff's Carbon-in-Leach Plant;

(b) animals and plants cultivated around the Bukit Koman area have died as a direct result of the use of sodium cyanide at the plaintiff's plant;

(c) the use of sodium cyanide at the plaintiff's plant has caused 'cyanide pollution' in Bukit Koman area; and

(d) the use of sodium cyanide at the plaintiff's plant has directly caused the air in the Bukit Koman area to be polluted due to presence of cyanide in the air.

THE SECOND ARTICLE

[4] The plaintiff in para 11 of the statement of claim averred that the following words found in the second article are defamatory of the plaintiff:

> A recent survey done by Bukit Koman villagers revealed that 78.1 percent of the residents in surrounding areas were suffering health problems, which is believed to be related to cyanide used in local gold mine. Topping the list was skin itchiness and rashes (50.1 percent), followed by eyesores/itchiness/dimness (43.9 percent), dizziness/headache (35 percent), fatigue (34.5 percent) and cough (33.4 percent).
>
> It is also revealed that the figures were higher among the residents who stay in Bukit Koman New Village, where 84.8 percent of the villagers said they have suffered at least one health problem, while 57.2 percent said their health conditions worsened after 2009, when the gold mine started operations.
>
> Residents of the Bukit Koman New Village had for a very long time alleged that cyanide, which is used in the nearby mine, had led to a range of skin, eye and respiratory ailments. This is the first time they have carried out a survey scientificafly to substantiate their claim.
>
> Dermatologist Khim Pa, who has 26 years experience in practice, also added that the results clearly showed that there is 'irritating' material on the air which caused the health problems, 'it is quite clear that more than 50 percent of people facing itchiness means that there is something in the air irritating to the eye and the skin ... It is worse on the expose parts of the skin. If the same particles goes into the lungs, they will cause coughing' said the doctor during a press conference held yesterday at the Kuala Lumpur and Selangor Chinese Assembly Hall.

According to the plaintiff in para 12 of the statement of claim those words in the second article in their natural and/or ordinary meaning and/or alternatively by way of innuendo, bear the following defamatory meanings of and concerning the plaintiff:

(a) 78.1 percent of the residents in the area surrounding Bukit Koman suffer from health problems due solely and/or directly to the use of sodium cyanide at the plaintiffs Carbon-in-Leach Plant;

(b) sodium cyanide used at the plaintiffs plant has escaped from the said plant;

(c) the use of sodium cyanide at the plaintiffs plant has solely and/or directly caused and/or led to 'a range of skin, eye and respiratory ailments'; and

(d) the air in the Bukit Koman area is polluted due directly and/or solely to presence of sodium cyanide which in turn caused the residents to suffer from skin and eye irritation.

THE FIRST VIDEO

[5] As I have alluded to, the first video was linked to the second article. It depicted a press conference held by several individuals who hold themselves out as members of the Bukit Koman Action Committee Against the Use of Cyanide in Gold Mining or also known as Ban Cyanide Action Committee ('the BCAC'). The words complained of as uttered in the first video are highlighted by the plaintiff in the para 17 of the statement of claim. According to the plaintiff, those words published in the first video in their natural and/or ordinary meaning and/or alternatively by way of innuendo, bear the following defamatory meaning of the plaintiff:

(a) the giddiness and lethargy experienced by residents of Bukit Koman are due solely to the plaintiff's plant being in operation;

(b) the plaintiff is the only cause of the persistent cyanide like odour in Bukit Koman;

(c) the plaintiff is the only cause of health deterioration of the residents of Bukit Koman since it began its operation in 2009; and

(d) the skin diseases, eye irritation, coughing and contaminated water which caused cancer suffered by the residents of Bukit Koman are all linked directly to the operations of the plaintiff's plant.

THE THIRD ARTICLE

[6] The plaintiff in para 20 of the statement of claim averred that the following words found in the third article are defamatory of the plaintiff:

> Residents of Bukit Koman, Raub are scheduled to hold a mass protest rally against the use of cyanide for gold mining activities by the Raub Australian Gold Mine (RAGM) Sdn Bhd in their neighbourhood.
>
> It has been more than 1,000 days since RAGM had started making money by extracting 'dirty gold', using life threatening cyanide compounds.

'No doubt that the mine bosses are laughing to their banks for they care not about the Raub residents', committee chairperson Wong Kin Hoong told a press conference in Kuala Lumpur today.

Wong said that the refinery has been spewing pollutants 24 hours everyday but those who speak up are harassed.

'We are are not against profit-making businesses, it just happened that this gold mine operates in a very unethical way that pollutes the environment and bring harm to our lives', said Wong.

On June 21, the committee had alleged that survey done on May 19 and 20 revealed that 78.1 percent of the residents in surrounding areas were suffering health problems, believed to be related to the cyanide used in local gold mine.

'This will be like that we did in February in Kuantan. We must stop irresponsible individuals who continue to pollute the planet', he said.

At para 21 of the statement of claim, the plaintiff averred that these words were defamatory of the plaintiff that can be understood to mean that:

(a) the plaintiff is earning profit at the expense of the lives of the residents of Bukit Koman and is using unscrupulous methods to extract gold;

(b) the plaintiff is only interested in making profits and not concerned about the health of the residents in Bukit Koman;

(c) the plaintiff's plant is spewing pollutants 24 hours a day and the residents are constantly being threatened by the plaintiff not to lodge any complaints;

(d) the plaintiffs plant operates in an unethical manner that pollutes the environment and endangers lives; and

(e) the plaintiff's plant is the sole and/or direct cause of 78.1% of the health problems suffered by the residents of Bukit Koman;

THE SECOND VIDEO

[7] The second video was linked with the third article and it depicted the press conference by several individuals holding out as the 'Himpunan Hijau Raub', including several politicians from PAS and DAP. The press conference was about the intended rally to protest the plaintiff's gold mining activities to be held on 2 September 2012. The words complained of as uttered in the second video are highlighted by the plaintiff in para 25 of the statement of claim and according to para 26 of the same, those words were defamatory of the plaintiff in that:

(a) the plaintiff's plant threatens the lives while making profit;

(b) the plaintiff is not concerned about the plight of the residents of Bukit Koman;

(c) a considerable amount of residents have fallen ill ever since the plaintiff's plant began operation;d. the government has allowed the plaintiffs plant which is likely causing pollution to be in operation 24 hours a day seven days a week; and

(d) the plaintiffs plant is 'dirty' and uses cyanide in its operation.

[8] It is also the plaintiff's case that the words complained of or the impugned statements in the said articles and videos were false and were published by the defendants maliciously. The publication of the said articles and videos are said to be intended to disparage the plaintiff in the way of its trade and business.

[9] The defendants' defence in a nutshell is that, apart from denying that the words complained of or the impugned statement in the said articles and videos were defamatory in nature of the plaintiff, the defendants principally relies on the defence of qualified privilege and fair comments. As for the defence of qualified privilege the defendants asserted that they have exercised responsible journalism and/or reportage. The defendants always maintained that the said articles and videos were published pertaining to matters or issues of public interest not just in Raub but of a national scale.

[10] Parties have filed in numerous bundles of documents for the trial, and at the trial the parties called the following witnesses:

For the plaintiff:

(a) Miss Gayathri Indran ('PW1') – PW1 is the plaintiff's Manager of Safety, Health & Environmental Department or SHE department in short. An Environmental Engineer by qualification, PW1 oversees the SHE department and among her main task is to ensure that regulatory requirements with regards to safety, health and environment are complied with by the plaintiff and that the gold mining activity is operating in a safe manner without posing harm or danger to employees, contractors and the community;

(b) Mr Murray Guy Butcher ('PW2') – PW2 is a consultant metallurgist based in Australia and has been engaged by the plaintiff to provide advisory and technical support in respect of the plaintiffs plant in Bukit Koman. He was also engaged to prepare his expert report in respect of the plant's operation;

(c) Dr Penelope Gillet ('PW3') – PW3 is an independent consultant occupational physician and also an Australian. She was engaged by the plaintiff to essentially assess and prepare a report pertaining to safety and health aspect arising from the operation of the plaintiff's plant;

(d) Michael Lew Tze Yeong ('PW4') – PW4 described himself as the digital forensic expert based in Singapore. He was called by the plaintiff to give evidence essentially relating to publication of materials on the internet that were related to the said articles and videos that are the subject matter of the present suit filed by the plaintiff against the defendants; and

(e) Dato Hj Azinudin bin Abd Rahim ('PW5') – PW5 is one of the directors of the plaintiff. A civil engineer by qualification, PW5 is in charge of matters requiring governmental approvals and dealing with government departments and agencies such as the Department of Environment and Department of Minerals and Geoscience.

For the defendants:

(a) Gan Diong Keng ('DW1') – also known as Mr Steven Gan. DW1 is the Editor-in-Chief of *Malaysiakini*. DW1 has the final say on whether a news item is published or not on the said news portal and as such responsible for the publication of the said articles and videos. DW1 testified that the gold mining operation of the plaintiff in Bukit Koman has been the subject of many news articles prior to, and also after, the publication of the said articles and videos. The plaintiff at the time has also instituted legal action against members of the BCAC and other news portal;

(b) Lee Weng Keat ('DW2') – DW2 is the second defendant and he is the Assistant News Editor of *Malaysiakini*'s Chinese Editorial Desk. He was the reporter that authored the first article. DW2 testified that he wrote the first article after reading several news items published in other newspapers, particularly in *Sin Chew Daily* and *Nanyang Siang Pau* websites, and also a blog pertaining to the controversy surrounding the activity of gold mining by the plaintiff in Bukit Koman, Raub. He has also interviewed via telephone one Wong Kim Hoong who was the Chairman of the BCAC and has included the substance of the said interview in the first article;

(c) Tan Jiun Wuu ('DW3') – DW3 is the senior videographer with the first defendant and as his designation suggests, he is responsible for producing and uploading videos to *Malaysiakini*'s video website. He attended the press conference on 20 June 2012 which was the subject matter of the first video and he edited and posted the first video based on the second article. DW3 also confirmed that the second article was authored by the third defendant. DW3 also produced the second video that was regarding the press conference on 2 August 2012 held jointly by the BCAC and the Himpunan Hijau Raub. The second video was edited based on the third article that was authored by the fourth defendant;

(d) Ng Ling Fong ('DW4') – DW4 is the deputy editor-in-chief with the first defendant. DW4 confirmed that *Malaysiakini* received invitation

from the organisers of the two press conferences, namely, on 20 June 2012 and two August 2012 and she accordingly assigned *Malaysiakini* journalists to attend the same;

(e) Lee Way Loon ('DW5') – DW5 is a journalist with *Malaysiakini*. DW5, among others, testified that he had contacted one Mr Andrew Kam from the plaintiff to comment on the press conference held on 2 August 2012 (ie the Himpunan Hijau press conference which was the subject of the third article and the second video) but Mr Adrew Kam refused any comment. DW5 himself has also written news articles regarding the Raub gold-mining issue, including that pertaining to the judicial review application filed by representatives of the Bukit Koman residents;

(f) Victor Tan Tsang Ming ('DW6') – DW6 is the fourth defendant and he was at the material time while pursuing a degree in journalism, an intern attached to the first defendant. He was instructed by the first defendant's English assistant news editor to attend and cover the press conference held on 2 August 2012. DW6 was the author of the third article, although his article was vetted and edited by his senior;

(g) Liew Wee Hong ('DW7') – DW7 is a journalist and he was the one who wrote the news article in *Sin Chew Daily* website entitled (in English) — '*Villagers Worry About Air Pollution As Yellow Substance Are Seen Floating in The Air*' This news article can be found at pp 115–116B of Bundle B19 and marked as exh D15;

(h) Chong Choong Nam ('DW8') – DW8 is the Editor of *Nanyang Siang Pau*. DW8 confirmed that the Chinese news article titled, as in English, — '*Villagers Fear Yellow Substance Floating in Bukit Koman Village The Environment was Polluted*' — was published on *Nanyang Siang Pau* website on 19 March 2012. This news article can be found at pp 117–117B of Bundle B19 and marked as exh D16.

(i) Wong Teck Chi ('DW9') – DW9 is the third defendant and is a Senior Journalist of *Malaysiakini*. DW9 authored the second Article that also has the linked to the first Video. DW9 confirmed that *Malaysiakini* received an invitation to the press conference that was held by the BCAC on 20 June 2012 and he has attended the same with his colleague, DW3; and

(j) Andrew Ong Kok Heng ('DW10') – DW10 is an Assistant News Editor of *Malaysiakini* and among others, is tasked with editing news before publication. He testified that he edited the article authored by the fourth defendant (DW6), that is, the third article.

[11] The parties have also filed in the statements of issues to be tried as per Bundle C. I have also given due consideration to the lengthy submissions of

learned counsel for both parties, including the case authorities cited. I will deal first with the plaintiffs defamation claim and later the plaintiffs claim for malicious falsehood.

THE PLAINTIFF'S DEFAMATION CLAIM

[12] Although there are many issues listed in the statement of issues to be tried, I am of the view that essentially there are two pertinent issues that required consideration and deliberation, namely, whether the words complained of or the impugned statements in the said articles and videos are defamatory in nature against the plaintiff, and if so whether the defendants have succeeded in raising the defence of qualified privilege and fair comment.

[13] It is of course trite that in order to succeed in a claim for libel, the plaintiff must first satisfied, on the balance of probabilities, the three basic elements of defamation, namely (a) the words complained of are defamatory in nature; (b) the words refer to the plaintiff and (c) that there is publication of the words complained of — see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 and *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 (CA). I think there is little dispute that the plaintiff has established two of the three elements of defamation, that is, the words complained of in the said articles and videos refer to the plaintiff and there is publication of the same. In the statements of agreement facts (Bundle D), the defendants readily admitted that the said articles and videos referred to the plaintiff. The said articles and videos were all published on *Malaysiakini* website at the respective dates and being an online news portal the said articles and videos would have been read and seen by its subscribers.

[14] Therefore the sole pertinent question in so far as the basic element is concerned is whether the words complained of or the impugned statements in the said articles and videos are defamatory of the plaintiff. Gopal Sri Ram JCA (as he was then) in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 (CA) neatly put the test as to what amounted to defamatory words as follows at p 374:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

Halsbury's Laws of England (4th Ed) defined defamatory statement as follows:

> A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be

shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to his office, profession, calling, trade or business.

It is important to note that the law looks and emphasises at the tendency of the words to lower the plaintiff in the estimation of ordinary reasonable readers. As long as there is such a tendency, then the words are defamatory, irrespective of whether they actually did not lower the plaintiff in the estimation of those readers — see *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393. The test is an objective one and it is a question of law and the plaintiff is not required to prove that the impugned statements were false. Once the plaintiff succeeded in showing that the words are capable of being defamatory in nature, the burden then shifted to the defendants to justify their publication. The defendants can either prove that the impugned statement are substantially true (ie defence of justification) or that they were published on the occasion of qualified privilege or fair comment.

[15] It is obvious that the said articles and videos reported on the concern of the residents of Bukit Koman as to their safety and health due to the operations of the plaintiff's gold-mining plant there. The first article clearly implied that the existence of the yellow substance and death of animals and plants cultivated around Bukit Koman was attributed to the plaintiff's mining operation. Even though words such as 'may be' and 'suspect' were used in the first article, the reading of the whole article in its proper context however would make a reasonable reader to conclude that the plaintiff was the main cause of the health and safety problem in Bukit Koman. Similar imputation can also be made in respect of the second article and third article and the corresponding first video and second video. The second article and the first video clearly reported that a survey carried out on the residents of Bukit Koman showed that many have suffered deteriorating health condition such as skin itchiness and rashes, and they attributed this deteriorating medical and health condition to the use of cyanide in a local gold mine. There is no other local gold mine in Bukit Koman except the plaintiff. The third article and the second video were more direct in their reference to the plaintiff. The plaintiff was, inter alia, accused of making profits at the expense of the health of the residents of Bukit Koman, and spewing pollutants 24 hours every day. In my view the third article and the second video clearly accused the plaintiff of using unscrupulous methods to extract gold without care to the well being of the residents of Bukit Koman. The words complained of clearly have the tendency to bring disrepute to the plaintiff in the eyes of any reader of the said articles and videos.

[16] It is therefore my judgment that the words complained of as stated by the plaintiff in paras 8, 11, 17, 20 and 25 of the statement of claim are capable of being defamatory of the plaintiff in their natural and ordinary meaning. I agree with the plaintiff's learned counsel that the said articles and videos

impute to the plaintiff dishonourable or discreditable conduct or motives or lack of integrity on part of the plaintiff of being unethical and greedy mining company. The plaintiff has therefore succeeded in proving, on the balance of probabilities, all the three basic elements of defamation.

[17] I would further note that the evidence of the plaintiff's witnesses, particularly PW1, PW2 and PW3, showed that the concern of the residents of Bukit Koman to their health and safety as depicted in the said articles and videos turned out to be without merits and groundless. The use of sodium cyanide by the plaintiff for its Carbon-in-Leach plant did not at all caused any pollution as the plaintiff has exercised stringent safety and appropriate methods in mining gold. In fact it was in evidence that the various health issues suffered by most of the residents of Bukit Koman were due to traces of herbicides.

QUALIFIED PRIVILEGE — REYNOLDS PRIVILEGE

[18] Next I will now deal with what I considered as the more critical issue in this case, that is, whether the defendants can avail themselves to the defence of qualified privilege, specifically the defence known as the *Reynolds* privilege as propounded by the House of Lords case of *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127; [1999] 4 All ER 609 (HL). Essentially the *Reynolds* privilege is a defence of responsible journalism and this particular defence is most likely to be raised by a newspaper and journalist, such as the defendants herein. It is the defendants' case that the publication of the said articles and videos are regarding matters of public interest that has been in the public domain for many years prior to the publication. The *Reynolds* privilege has two pre-requisites before the defendants can avail to it and they are:

(a) the publication concerned a matter of public interest; and

(b) responsible and fair steps had been taken to gather, verify and publish the information.

Lord Nicholls of Birkenhead in the *Reynolds* case went on to set out matters that needs to be considered in evaluating whether or not the publisher has exercised responsible journalism and he listed ten of these, inter alia, the seriousness of the allegation, the nature of the information, steps taken to verify the information and the urgency of the matter. Learned counsel for the plaintiff submitted that the defendants have failed the said ten tests listed by the *Reynolds* case. However, Lord Nicholls himself has said that the so-called ten tests is merely illustrative, which means it is just a general guideline. Whether responsible journalism has been exercised by the publisher of a newspaper in publishing the impugned statements will definitely depend on the facts and circumstances of each particular case.

[19] In *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl*

[2006] 3 WLR 642 (HL), the House of Lords again explained that the Lord Nicholls's ten tests were non-exhaustive and that the standard of conduct required of the newspaper must be applied in a practical and flexible manner and having regard to the practical realities. Lord Hoffman in *Jameel*'s case then made the following observations at p 662 of the Law Report:

> ... The fact that the defamatory statement is not established at the trial to have been true is not relevant to the *Reynolds* defence. It is a neutral circumstance. The elements of that defence are the public
>
> interest of the material and the conduct of the journalists at the time.
>
> In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial.

It can be surmised that the defence of *Reynolds* privilege also comprise of 'reportage'. Reportage is said to be a special defence and a rare form of *Reynolds* privilege — see *Flood v Times Newspapers Ltd* [2012] 2 WLR 760 (SC) (Tab 2 of defendants' bundle of authorities). Lord Phillips in *Flood*'s case explained as follows (at p 783):

> ... Reportage is a special, and relatively rare, form of *Reynolds* privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made.
>
> It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it.

Therefore there are two situations where the *Reynolds* privilege can be raised as a defence. First is responsible journalism, where the public interest in the allegation that is reported lies in its contents. In other words, the subject matter of the impugned statement is a matter of public interest. In this first situation the journalist must exercise responsible journalism; for example, he has to consider whether there is likelihood that the allegation might not be true. This is where Lord Nicholls's ten tests in the *Reynolds* case can be used. Second is reportage, where the public interest lies in the making of the allegation itself and not the contents of the allegation.

[20] A good example of reportage is the *Jameel*'s case. The defendant, a journal, published an article concerning the request of the US Government to the central bank of Saudi Arabia to monitor accounts in order to prevent them from being used for channelling funds to terrorist organisations. The articles mentioned the names of those who were being 'blacklisted', which included the name of the claimant. The claimant sued the defendant for defamation in publishing its name in the article. The House of Lords in reversing the lower courts' decision, held that the *Reynolds* privilege was available to the defendant.

This is because the House of Lords considered that reporting both the existence of the 'blacklisted' names and the disclosing of those names, were in public interest. Since the naming of those in the blacklist was of public interest, the defendant did not need to verify the aspect of the publication that was defamatory.

[21] The most important aspect of the *Reynolds* privilege defence, be it responsible journalism or reportage, is the element of public interest. In fact the term *Reynolds* privilege is said to be misleading. The more accurate description is 'public interest defence' — see observation by Lord Phillips in *Flood*'s case. This is because without the element of public interest, the defence will fail. The *Reynolds* privilege exists where public interest justifies the publication of the statement despite the fact that this carries the risk of defaming an individual who will have no remedy. It is a balancing act between the need for the public to receive the information and the potential harm that may be caused if the individual is defamed.

[22] With that legal propositions, I now turn to the said articles and videos to determine whether the defendants in the circumstances of this case can avail themselves to the *Reynolds* privilege defence.

[23] On the issue of public interest, I believe the question that needs to be asked and answered is whether there was a need at the material time for the public in general to know about the information published in the said articles and videos and that the defendants as newspaper and journalist was under a public duty to tell the public. In my opinion any matter or issue that concern the health, well-being and safety of a community is always a matter of public concern, not just to that particular community but also to the general public. The defendants through their witnesses, particularly DW1, DW4 and DW10, have shown that prior to the publication of the said articles and videos, there was already extensive coverage by the other media on the issue of gold mining activities using cyanide and that the issue was also raised even in the Pahang Legislative Assembly. In 2006 onward, news began to emerge on a national scale that the residents of Bukit Koman started to raise protest on the use of cyanide in the plaintiff's gold mine. News articles began to be published in newspapers such as *Nanyang Siang Pau*, *The Star*, *Utusan Malaysia*, *Sin Chew Daily* and *China Press* surrounding the alleged use of cyanide in the plaintiffs Carbon-in-Leach plant in Bukit Koman. There was also legal proceedings by way of judicial review instituted by four members of the Bukit Koman residents in 2008 to challenge the Environment Impact Assessment Report pertaining to the mining and extraction of gold in Bukit Koman. The concern of the Bukit Koman's residents pertaining to the gold mining activity of the plaintiff has even led to the formation of the BCAC, a public interest group against the use of cyanide in gold mining. In the circumstances, I think there is clear evidence

A that issue pertaining to the concern of the Bukit Koman's residents about the operation of the gold mine in their town was clearly a matter of public interest.

[24] The first article published in *Malaysiakini* website on 19 March 2012, as testified by DW2 ('the second defendant'), was sourced from the news B appearing in websites on the internet, particularly *Sing Chew Daily* website and *Nanyang Siang Pau* website. DW7 and DW8 confirmed that the news items exhs D15 and D16 respectively, were published on their respective newspaper's website. Exhibits D15 and D16 was about the concern of the villagers of Bukit C Koman about air pollution caused by yellow substance floating in the air. DW2 also visited other blogs that spoke about the same subject matter. And finally, DW2 contacted and spoke to Wong Kin Hoong who was at the material time the Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article. Objection were taken by learned counsel for the D plaintiff on the admissibility of exhs D15 and D16. I see no merits in the objection taken by learned counsel. The two exhibit have been confirmed and verified by the editors of the two newspapers, that is DW7 and DW8, and therefore the authenticity of the same cannot be doubted.

E **[25]** I am of the opinion that the first article merely reported the concern of the Bukit Koman's residents as to their health and the suspicion that the air pollution may be caused by the plaintiff's gold mining operation. Reading the first article as a whole, one will find that it made no allegations or criticism against the plaintiff. In other words, there is no embellishment of the contents F of the first article by the first and second defendants. Much has been argued by learned counsel for the plaintiff that the first and second defendants have not verified the contents of the first article with the plaintiff or with other experts before publishing the same. However, in my opinion the act of the second defendant contacting the Chairman of the Bukit Koman Anti-Cyanide G Committee prior to the publication of the first article was sufficient in the circumstances of this case to constitute responsible journalism. This is because the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman's resident regarding the air pollution which they suspect was caused by the plaintiffs plant. The defendants therefore H has satisfied the test of responsible journalism.

[26] As for the second article with link to the first video and the third article with link to the second video, it cannot be denied that these were reproduction of the two press conferences held on 21 June 2012 and 2 August 2012. There I is no evidence that the first defendant as publisher of those articles and videos, the third defendant as author of the second article, the fourth defendant as author of the third article and DW3 as the videographer for the first and second videos adopted the contents of those articles and videos as their own. As I have alluded to, the said articles and videos are matter of public concern where the

public in general has the right to know the information and the defendants as media and journalists were under, at least a moral duty to publish the same.

[27] Further, it is my judgment that the defence of reportage is clearly available to the defendants with regard to the publication of the second and the third articles and the first and second videos. It is not so much the truth of the contents of the said articles and videos that matters, but rather the fact that they were reproduction of the two press conferences held by BCAC, first on 21 June 2012 and, second on 2 August 2012. *Malaysiakini* and other medias had received invitation to attend the two press conferences. The defence of reportage is therefore available to the defendants because the public interest here lies not in the truth of the contents of the said Articles and Video, but on the fact that they had been made. The two press conferences held by BCAC themselves, in my view, are matter of public interest. I am aware of the general principle that a person who repeats the defamatory words of another will also be liable to the person defamed. However, it has been said that the *Reynolds* privilege of reportage appears to be the exception to the so-called general rule of repetition.

[28] The plaintiff's learned counsel submitted that the defendants have not specifically pleaded reportage in their defence and as such should not be allowed to rely on this particular defence. I merely wish to say that reportage is one form of the *Reynolds* privilege and it is considered part of the qualified privilege defence. The defendants have pleaded qualified privilege as one of their defences to the

plaintiff's claim in paras 33 and 35 of the defence. In my opinion that would be sufficient to enable the defendants to prove reportage at the trial of the action. I am also in agreement with learned counsel for the defendants that the case of *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191 (CA) relied upon by the plaintiff's learned counsel was decided based on the particular facts of that case.

MALICE

[29] I find that the said articles and videos were published in a fair, disinterested and neutral way and that the defendants did not adopt the allegations contained therein as their own. There is also no evidence of malice shown on part of the defendants in the publication of the said articles and videos as what the plaintiff tried to make out. I accept the plaintiff's learned counsel's submission that malice can be inferred through conduct of a journalist, such as when he showed no interest in seeking or verifying the truth of the information despite him having serious doubt as to its truthfulness. However in our present case, the first defendant has not only been publishing

news reports that were deemed adverse to the plaintiff, but has also published news report that were seen as favourable to the plaintiff. The first defendant through its *Malaysiakini* website has prior to, and even after, the publication of the said articles and videos published several other articles regarding and/or related to the plaintiffs operation of the gold mine. Some of the news articles published prior to the publication of the said articles and videos were as follows:

(a) the news by *Bernama* titled 'Water Sample In Bukit Koman Free From Cyanide' dated 17 May 2012 (Tab 123 of Bundle B5);

(b) the news titled 'Penduduk selamat, kilang guna sianida' dated 25 June 2009 (Tab120 of Bundle B5); and

(c) the news titled 'Raub Gold Mine Is Safe, Says Yen Yen' dated 27 June 2009 (Tab 211 of Bundle B5);

And some of the news articles that were published after the publication of the said articles and videos were as follows:

(a) the news titled 'Liow: Bukit Koman Health Monitored Since 2009' dated 30 August 2012 (Tab 354 of Bundle B5);

(b) the news titled 'Groups Object To Sunday's Anti-Cyanide Rally' dated 30 August 2012 (Tab 353 of Bundle B5); and

(c) the news titled 'Raub Green Rally Made Up of Outsiders, Says RAGM' dated 8 September 2012 (Tab 356 of Bundle B5).

Apart from that the first defendant also published news regarding the various legal actions taken by the plaintiff against several parties arising out of the allegation that it was the cause of health and safety issues to the Bukit Koman's residents. And in so far as the third article is concern, the plaintiff did try to get a response from the plaintiff prior to the publication but the plaintiffs representative refused any comment. It is also in evidence that the first defendant through it solicitor's letter dated 30 July 2012 did offer the plaintiff a right to reply to the said articles and videos which the first defendant would publish.

[30] In *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 (CA) the Court of Appeal said that in the defence of qualified privilege, and this of course include the *Reynolds* privilege, the underlying exonerating element is that the defamatory articles were made without malice. The law is that the burden is on the plaintiff to show that the defendants were actuated by malice in the publication of the said articles and videos. However based on the evidence in this case, I am of the view that the plaintiff has failed to prove that the publication of the said articles and videos were actuated by malice on part of the defendants.

MALICIOUS FALSEHOOD

[31] It is trite that one of the vital ingredient in the tort of malicious falsehood is that the impugned statements, apart from being false, is published maliciously. As I have already ruled, that plaintiff has not proven malice, so it follows that the plaintiff's claim for malicious falsehood must also necessarily fail.

[32] Be that as it may, the plaintiffs learned counsel did submit that the defendants have continued to maintain that there was basis for them to publish the said articles and videos despite the fact that they are aware of another news portal, *Free Malaysia Today*, has apologised to the plaintiff for the publication of articles of similar in nature. However, I am of the view that the apology of other news portal, and in fact of other parties including the members of the BCAC, as settlement of the suit filed against them by the plaintiff is not evidence of malice in the circumstances of this case.

CONCLUSION

[33] It is therefore my judgment that based on the reasons stated, the defendants have succeeded in their defence of qualified privilege, that is responsible journalism and reportage — the *Reynolds* privilege. Malice was also not proven. On these grounds, the plaintiff's claim against the defendants ought to be dismissed. There is no necessity for me to deal with the defence of fair comments.

[34] The plaintiffs claim against all the defendants is hereby dismissed. As for costs, after considering the submission of learned counsel for both sides, I hereby order the plaintiff to pay costs of RM50,000 to the defendants, subject to the payment of the allocator fee.

Claim dismissed with costs of RM50,000.

Reported by Kohila Nesan